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FEATURE COMMENT: How To Protect Internal Investigation Materials From Disclosure

U.S. ex rel. Barko v. Kellogg Brown & Root, Inc., 2014 WL 1016784 (D.D.C. March 6, 2014)

A bizarre and unexpected event occurred, as frequently happens, in our nation's capital: A federal court ordered defense contractor Kellogg Brown and Root Inc. (KBR) to produce internal investigative reports from its law department. Although the reports were prepared at the direction and supervision of counsel, initiated in response to employee complaints of contracting fraud, and kept under lock and key in a legal department file cabinet, the court concluded that they were not privileged and had to be produced to the relator in a qui tam False Claims Act case.

Although the court in *Barko* may have misinterpreted the law, and the ruling may ultimately be vacated, the decision should be carefully considered, as changes may be necessary to the way in which companies—and not just Government contractors—conduct internal investigations to avoid the same fate. With some strategic, practical changes recommended below, companies can lay the foundation for protecting their internal investigation materials, e.g., witness interview summaries, from compelled disclosure.

Barko's Case—This saga began in 2005 when Barko filed an FCA action alleging that KBR overcharged the U.S. Army for services performed in Iraq under the Logistics Civil Augmentation Program (LOGCAP III) contract. In short, Barko alleged that KBR incurred excessive and fraudulent subcontractor costs on work performed by its subcontractor, Daoud and Partners (D&P), and then knowingly passed those costs on to the Army. Barko alleged, inter alia, that D&P—which was based in Jordan and was retained to build and staff laundry facilities, build wells, and construct a dormitory—received favoritism in the procurement process, overcharged KBR, and performed poorly. After conducting its investigation, the Government declined to intervene, and the qui tam case was unsealed in 2009.

During discovery, Barko asked KBR to produce any internal "audits, inspections, studies, or self-evaluations" that KBR had undertaken concerning its compliance with Government contracting regulations on LOGCAP III. KBR produced 100,000 pages of documents. Included in its productions were some "tips" that its employees had made to KBR's ethics and compliance hotline. Among those were complaints about D&P and possible kickbacks, conflicts of interest, and slow, sloppy work. Although KBR produced these written employee tips, it withheld as privileged the investigative reports that were prepared in response to those tips, on the grounds that they were protected from disclosure by both the attorney-client privilege and the work product doctrine.

Undeterred, Barko filed a motion to compel production of those reports, which were prepared during so-called code of business conduct (COBC) investigations. Barko argued that the internal reports were not privileged because they were generated by "business necessity," not for legal advice. Barko reasoned that because KBR was required by law and regulation—primarily 48 CFR § 203.7000 (2001), but also § 406 of the Sarbanes-Oxley Act and the U.S. Sentencing Guidelines—to establish a written code of ethics, implement an internal controls system, investigate possible misconduct by its employees and timely disclose confirmed misconduct to the Government, each investigation and report was done to serve KBR's *business* needs, rather than to provide legal advice.

Barko argued that as such the reports were intended to be shared with the Government consistent with KBR's COBC and Government regulations. Barko further argued that because the internal reports at issue helped KBR comply with the law, make managerial changes, take disciplinary action, disclose misconduct to the Army and refund overpayments to the Government, they related to business—not legal—decisions.

In its opposition, KBR argued that the manner in which the COBC reports were created demonstrated that they were privileged. Specifically, employees could report misconduct to their supervisor or through a telephone hotline, post office box or e-mail address, or they could contact the legal department directly. All tips were funneled to KBR's COBC director, an in-house *lawyer*, who decided whether an investigation was needed.

The LOGCAP III investigations were referred to KBR's vice president of legal for infrastructure, Government and power. This attorney directed and coordinated the COBC investigation by working with security officers in Iraq, who conducted employee interviews, prepared witness statements and sometimes consulted subject matter experts. Once that phase of the investigation was complete, the security officers sent a COBC report back to the legal department to enable KBR's lawyers to decide how to proceed—e.g., whether or not to make a disclosure to the Government. The COBC reports were then locked in a file cabinet that only attorneys could access.

KBR's position was that the internal reports were initiated by, directed by and meant for KBR's own attorneys, and thus fit the definition of privileged material under *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981). Although nonattorneys may have performed the investigation, they were always working at the direction of counsel. Moreover, given the nature of the allegations, the reports were also attorney work product, made in anticipation of litigation.

The District Court's Decision—Judge James Gwin from the U.S. District Court for the Northern District of Ohio, sitting by designation in Washington, D.C., disagreed with KBR. After reviewing the internal reports in camera, the court characterized them as "eye openers" (and later noted that "KBR may be embarrassed" by what they revealed) and ordered their production. The court also quoted snippets from the internal reports, revealing on the public docket material that KBR contends was privileged. Finally, it chided KBR for arguing (or at least inviting the inference) in a motion for summary judgment that the reports showed no evidence of wrongdoing, although they did, and trying to "hide behind attorney-client privilege claims" to avoid disclosing bad facts.

The court concluded that the COBC reports were not privileged because they are "ordinary business records" created "pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." KBR was required by a Defense Federal Acquisition Regulation Supplement provision to maintain an internal control system, have a written code of ethics, implement a method for receiving employee complaints and timely report misconduct to the Government. 48 CFR §§ 203.7000–7001. Because the COBC merely implements these regulations, according to the court, a COBC investigation was nothing more than "a routine corporate … compliance investigation required by regulatory law."

The court noted that the COBC investigations were unlike the investigation in Upjohn because KBR attorneys did not confer with outside counsel, the KBR employees who *were* interviewed were not warned that the investigation's purpose was to give KBR legal advice, and the investigation was performed by nonattorneys. As such, the court ruled that the reports were not prepared primarily for legal advice or in anticipation of litigation**.**

After the district court's ruling, KBR requested certification of the question for interlocutory appeal under 28 USCA § 1292(b), and a stay of the decision. The court refused both requests, noting that it was "not a close question" whether or not the reports were privileged. KBR filed a petition for writ of mandamus in the U.S. Court of Appeals for the District of Columbia Circuit, requesting that it vacate the lower court's ruling. Supported by several amici, KBR argued that the ruling "eviscerates Upjohn" and, if left intact, would "deny attorney-client privilege and work-product protection to all internal investigations conducted by major federal Government contractors." On March 28, the D.C. Circuit granted a stay and scheduled oral argument on the petition.

Analysis—Although the D.C. Circuit has yet to rule on KBR's petition, there are several good reasons, both legal and policy, for vacating the district

court's decision. For one, it is not clear in the court's nine-page ruling how the district court distinguished "business" decisions from "legal" ones. The court reasoned that KBR failed to show that the investigation reports were attorney-client privileged because they "were undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." The court specifically relied on 48 CFR §§ 203.7000–7001 (2001), which requires that certain regulated contractors have a "system of management controls" that include a written code of business ethics and conduct, an ethics training program, periodic reviews of business practices, procedures and policies, internal controls for compliance with standards of conduct, an employee complaint hotline, and timely reporting of any suspected violation of law in connection with Government contracts. Id. § 203.7001(a)(1)–(7).

However, there is a wide spectrum of laws and regulations—on taxes, trade restrictions and tariffs, for example—that contractors are required to follow and that in-house counsel address every day. Although compliance with these laws and regulations may impact a company's business, it is fundamentally a legal question. The lower court's decision fails to explain why compliance with Government contracting regulations is any different. Merely because a company must, for example, pay taxes, does not mean that its tax attorneys do not provide legal advice when helping the company determine its obligations in calculating the amount. Helping a corporation comply with a statute or regulation—although required by law—does not transform quintessentially legal advice into business advice.

Companies may make many decisions after an investigation—changes to corporate policy, Government disclosures, litigation, or contract modifications—all of which likely have a legal component, and are not purely business decisions. Whether a contractor must make a mandatory disclosure, for instance, can be a thorny legal question given the vague "credible evidence" test—an invoice may be "false" under the FCA in one circuit, but not in another. FAR 52.203. The fact that the FAR requires mandatory disclosure does not mean that deciding whether to make a disclosure is a non-legal decision.

The district court reached a different result applying a but-for test to determine privilege. Under this test, a communication is privileged only if it would not have been made but for the fact that legal advice was sought. Mixed-motive communications, where a question may have both legal and business components, are not privileged unless they would not have been made but for the client seeking legal advice. Putting aside whether this is the proper interpretation of the law—and it may not be, as KBR and amici have argued to the D.C. Circuit—the court's reasoning forces Government contractors and other regulated entities into a Hobson's choice.

The mandatory disclosure rule, FAR 52.203-13 requires that contractors disclose credible evidence of violations of certain federal criminal laws and the FCA. Contractors also must have a written code of business ethics and conduct, and must install an ethics awareness and compliance program and an internal control system. Failure to make timely disclosures of credible evidence of wrongdoing can lead to suspension or debarment. 48 CFR §§ 9.406-2, 9.407-2. Although the mandatory disclosure rule did not take effect until December 2008, well after the events in *Barko*, the rule's requirements are analogous to the requirements in the provisions on which the court relied: 48 CFR §§ 203.7000–7001.

Under the court's reasoning, a contractor that follows the requirements of the mandatory disclosure rule might not be able to assert the attorney-client privilege over material generated during an internal investigation because, the reasoning goes, the investigation was required by law or by an ethics or compliance program. Legal advice might be one reason for the investigation, and even an important one, but it could never be the sole, triggering reason—the but-for reason.

Such a result is difficult to square with FAR 52.203-13, which provides that a contractor need not "waive its attorney-client privilege or the protections afforded by the attorney-work product doctrine" to cooperate fully with the Government. Yet this is the effect that the court's ruling would have if adopted. If a contractor follows a federal regulation or internal policy that requires investigation of potential misconduct, it would (according to the district court) not satisfy the but-for test, resulting in the disclosure of materials that FAR 52.203-13 makes clear do not need to be disclosed.

This concern is not unique to Government contractors. Many companies are required by statute, regulation or internal policy to receive and review possible violations of law. Section 301 of the Sarbanes-Oxley Act, P.L. 107-204 (2002), as implemented,

requires audit committees of public companies to establish procedures for the "receipt, retention, and treatment of complaints received by the listed issuer regarding accounting, internal accounting controls, or auditing matters." Rule 10A-3, Securities Exchange Act of 1934. In light of *Barko*, a plaintiff might seek to compel disclosure of internal complaints and reports prepared by publicly traded companies.

If *Barko* is not vacated, it may have other unintended consequences. Companies that know that their internal investigations may be disclosed to the Government or qui tam plaintiffs may be reluctant to conduct robust investigations, and might instead conduct short, superficial inquiries, or fail to memorialize their findings in writing. Ironically, companies that continue to conduct and document internal investigations could conceivably be punished for it by compelled disclosures. This would create a disincentive for companies to implement the very regulations that were intended to strengthen corporate oversight and compliance.

Recommendations—While it is too soon to know whether *Barko* will be vacated, courts in other jurisdictions may find aspects of the district court's analysis "compelling" and may begin to test claims of privilege with more suspicion; qui tam relators certainly will. Prudent companies can implement a number of measures to position themselves to protect the otherwise privileged fruits of internal investigations from disclosure.

Attorneys Should Conduct Employee Interviews: The district court concluded that the investigation reports were not privileged in part because fact-gathering interviews were conducted by nonattorneys, typically investigators from KBR's security department with a background in law enforcement. Employees being interviewed, the court reasoned, "certainly would not have been able to infer the legal nature of the inquiry." While there are several ways to address this problem and maintain the privilege even if nonattorneys conduct the interviews, as discussed below, one simple way to address this factor is to have attorneys conduct all employee interviews. As the Supreme Court said in *Upjohn*, the attorney-client privilege applies if the "communications at issue were made by [company] employees to counsel for [the company] acting as such, at the direction of corporate superiors in order to secure legal advice from counsel." *Upjohn*, 449 U.S. 383.

Where nonlawyers do conduct interviews, however, counsel can seek to prevent the interviewer's notes from disclosure by adopting a routine practice of not retaining the notes after the counsel's review (assuming there are no spoliation concerns or obligations to preserve). After counsel uses the notes to understand the factual events under investigation and incorporates those facts into the attorney's own legal analysis and advice, the notes may be destroyed in the regular course of business.

Interviewers Should Give Upjohn *Instructions*: The KBR investigators who conducted the interviews, despite working at the direction of KBR counsel, never told the employees "that the purpose of the interview was to assist KBR in obtaining legal advice." Instead, the KBR employees were asked to sign a confidentiality statement that did not warn the employee that the interview was part of a legal investigation. The court focused on these facts as evidence that the interviews were part of a business, not legal, decision.

One thing companies must do, regardless of whether the interviewer is an attorney, is provide each interviewee with an adequate *Upjohn* instruction at the start of the interview. If an attorney conducts the interview, the attorney must explain that he or she represents the company, not the employee. This warning is needed to stop the employee from incorrectly assuming that the attorney is their own, and to avoid creating a potential conflict that may lead to the attorney's disqualification from representing the company. It also helps prevent the witness from later trying to assert a putative attorney-client privilege with the attorney to prevent disclosure of what was said during the interview.

Whether the interview is conducted by an attorney or a nonattorney, the interviewer must explain at the outset that the purpose of the interview is to obtain facts that the legal department needs to provide legal advice to the company in anticipation of litigation. This explanation gives the employee a better sense of the interview's purpose, and it helps to lay the foundation for a future claim of attorney-client privilege. In *Upjohn*, for example, the Supreme Court emphasized that "the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice." *Upjohn*, 449 U.S. 383. The interviewer should also tell the employee that the interview is protected from disclosure by the attorney-client privilege. Although the privilege belongs to the company, which it may

later in its sole discretion waive, the witness should keep the contents of the interview confidential, and not talk about it with family, friends or coworkers.

Lastly, the interviewer should keep a record that the witness was given a proper *Upjohn* instruction. It is good practice to create a memorandum afterward that details the *Upjohn* instruction and the witness' understanding of the instruction. Regardless of the approach, the interviewer should keep some record that the instruction was given, acknowledged and understood.

Attorneys Should Actively Direct and Closely Manage Each Investigation: If nonattorneys conduct fact-gathering investigations or employee interviews, it is critical that the investigation be actively directed and managed by an attorney who is seeking to provide the company with legal advice. In *Barko*, the district court concluded that KBR's COBC investigations were routine and undertaken for compliance purposes, not for legal advice. The attorney should be actively involved in deciding who to interview, the focus of the investigation and questions asked, as well as in identifying the documents or contracts which need to be gathered and analyzed. It is also a good idea for the attorney to hold regular status meetings with the investigation team, to ensure that the investigation is on track and anchored in the legal department. One way of doing this, for example, is for the attorney to hold weekly or biweekly conference calls with the investigation team, and for the shared calendar entry to denote expressly that the conversations are attorney-client privileged and are being held in anticipation of litigation. Courts look skeptically on investigations that are conducted without counsel or with "arms-length coaching by counsel." *U.S. v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121 (D.D.C. 2012).

Attorneys Should Memorialize the Investigation's Purpose: Corporate counsel—whether conducting the investigation themselves, with the help of outside counsel or with nonattorneys—should memorialize the scope and purpose of the interview. This can be done by drafting and circulating to the entire investigation team a memorandum outlining the reasons for the investigation, the triggering event, the legal advice being sought by the corporation, and the possibility of future litigation based on the facts then known. This memo can be revised as more information is uncovered or as the focus of the investigation shifts. But the key point is to memorialize for everyone that the investigation is being undertaken to provide legal advice or in anticipation of litigation, and not for business advice, e.g., regarding a human resources issue.

Retain Outside Counsel: Corporate counsel should recognize that investigations performed by outside counsel—because they are more clearly retained for legal advice, not for business advice—are afforded more protection from disclosure. Outside counsel do not wear "several hats" as do in-house counsel. As a result, their investigations and reports are typically understood by courts and the qui tam bar as more solidly protected by the attorney-client privilege or work product immunity. Of course, not every investigation must or even should be led by outside counsel, but in sensitive situations, the option should at least be considered.

Conclusion—The district court's ruling in *Barko* may yet find support with other judges, or spur qui tam plaintiffs to be aggressive in seeking disclosure of internal investigation materials and challenging the scope of the attorney-client privilege and work product protection. Rather than risk compelled disclosure of sensitive reports, or the cost of litigating the issue, contractors and other regulated companies can implement a number of practical measures to encourage candor by employees during internal investigations.

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